UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	No. 4:CR-02-0085-02
vs.	:	
	:	
MICHAEL ALLEN MORGRET	:	(Judge Muir)
	:	

ORDER

September 5, 2006

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 28, 2006, Defendant Michael Allen Morgret filed a motion to withdraw his guilty plea. It is the third such motion which Morgret has filed in this case. A brief supporting the motion was filed on August 8, 2006. The government filed its opposition brief on August 11, 2006. Morgret's reply brief was due to have been filed by August 28, 2006, and to this date no such brief has been filed. Morgret's motion to withdraw his guilty plea is ripe for disposition.

Federal Rule of Criminal Procedure 11(d), entitled "Withdrawing a Guilty or Nolo Contendere Plea," provides in relevant part that

> [a] defendant may withdraw a plea of guilty or nolo contendere ... after the court accepts the plea, but before it imposes sentence if ... the defendant can show a fair and just reason for requesting the withdrawal.

Fed.R.Crim.P. 11(d). "The burden of demonstrating a 'fair and

just' reason falls on the defendant, and that burden is substantial." United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2004)(citing United States v. Hyde, 520 U.S. 670, 676-77, 117 S.Ct. 1630 (1997); United States v. Isaac, 141 F.3d 477, 485 (3d Cir.1998)).

The Court of Appeals for the Third Circuit has amplified the requirements to be met for a defendant to withdraw a guilty plea, and has consistently held that

> [a] district court must consider three factors when evaluating a motion to withdraw a guilty plea: (1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal.

United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2004)(citing United States v. Brown, 250 F.3d, 811, 815 (3d Cir. 2001); United States v. Huff, 873 F.2d 709, 711 (3d Cir.1989)). It is especially significant that the Court of Appeals for the Third Circuit has also commented that

> a shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose upon the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.

United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001).

We will apply those legal principles to Morgret's pending motion to withdraw his guilty plea. Before considering the merits of that motion, we will detail the material procedural and

factual history of this case.

This matter originated on April 11, 2002, with the filing of a six-count indictment against Defendant Michael Allen Morgret and six other individuals. A second superseding indictment containing 19 counts was filed on November 14, 2002. The crimes charged relate to an alleged conspiracy to distribute powder cocaine and crack cocaine. In the course of that conspiracy some of the defendants, including Morgret, agreed to commit arson to obtain additional funds for the purchase of those drugs.

On August 25, 2003, Morgret pled guilty to counts 1 and 6 in that indictment. Count 1 charged Morgret with conspiring to possess with intent to distribute and the distribution of in excess of 50 grams of cocaine base and cocaine. Count 6 charged Morgret with conspiracy to intimidate witnesses, to possess and distribute firearms illegally, and to commit arson and mail fraud.

On December 5, 2003, we received Morgret's pre-sentence report. Morgret immediately filed objections to his presentence report. At that point progress in this case was retarded by five substitutions of counsel for Morgret and the filing of various motions, some of which were prompted by the decisions of the United States Supreme Court in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and United States v. Booker, 543

U.S. 220, 125 S. Ct. 738 (2005).

The relief sought in two of Morgret's prior motions was the right to withdraw his guilty plea. The first such motion was filed on December 19, 2003. After granting Morgret a number of extensions of time to file a brief in support of that motion, on August 3, 2004, Morgret filed a "Motion to Withdraw [the] Previously Entered Motion to Withdraw Guilty Plea." Paragraphs 2 and 3 of that motion state as follows:

> 2. The basis for [the motion to withdraw the guilty plea] was that Mr. Morgret's plea was not knowing, intelligent and voluntary because he was unaware of the potential increase in his guideline range which might ensue if he were to attempt to argue or contest the Exceptions to the Pre[-] Sentence Report filed by the Probation Office, and that his counsel may have been ineffective in not more fully advising him of the risks involved in filing the exceptions as he did.
>
> 3. After careful consideration, and thorough discussions with present Counsel, Mr. Morgret has directed counsel that he wishes to proceed with his guilty plea, and that he wishes to have the Court consider his Pre Sentence Report in the light of the recent *Blakeley* decision.

(Motion to Withdraw Previously Entered Motion to Withdraw Guilty Plea, p. 1, ¶¶2, 3) On August 9, 2004, we ruled on that motion by entering an order which provided that "[t]he Motion to Withdraw Guilty Plea filed by Mr. Morgret on December 19, 2003, shall be deemed withdrawn." (Order of August 9, 2004)

As expressed by Morgret in paragraph 3 of his August 3, 2004, motion, at that point he consciously chose, with the advice

of counsel, to proceed on the basis of his guilty plea. In furtherance of that decision, Morgret filed supplemental objections to his presentence report on September 16, 2004, and February 3, 2005.

A presentence hearing on those objections commenced on July 22, 2005, and reconvened on September 16, 2005. During the hearing Morgret filed an oral motion to apply the "beyond a reasonable doubt" standard of proof to his objections. After that motion was fully briefed, on November 22, 2005, we issued an opinion and order consisting of 39 pages and including 101 findings of fact. That document discusses in great detail Morgret's participation in the crimes to which he plead guilty, and in it we ruled upon all of Morgret's objections to the report. That order also established the schedule for the parties to file their sentencing briefs, the sole purpose of which were to apply the factors set forth in 18 U.S.C. § 3553(a) to the facts of this case.

After granting Morgret a number of extensions of time to file his sentencing brief, on March 10, 2006, Morgret filed a pro se motion in which he requested the court to 1) discharge his counsel and appoint new counsel, and 2) allow him to withdraw his guilty plea and proceed to trial with new counsel. For the purposes of this order, the only relevant facet of that motion is

the one dealing with Morgret's desire to withdraw his guilty plea. Morgret had argued in the motion that he was entitled to such relief because, *inter alia*, 1) a number of statements made by his original counsel, John A. Felix, caused Morgret to misunderstand the maximum sentence he could receive as a result of pleading guilty, and 2) Morgret's failure to receive a three-level downward adjustment for acceptance of responsibility constituted a breach of the plea agreement by the government.

On March 14, 2006, we issued an order in which we denied Morgret's motion to withdraw his guilty plea. With respect to the argument that Attorney Felix's allegedly inaccurate statements caused Morgret to misunderstand the potential maximum sentence he faced, we concluded that such a claim could be raised only in a post-conviction motion. With respect to his argument that he was wrongfully denied a three-level downward adjustment for acceptance of responsibility, we ruled that the argument had no merit because 1) the text of the plea agreement expressly provides that the court's refusal to credit Morgret for any acceptance of responsibility was not a basis to revoke the guilty plea, and 2) Morgret had argued this issue in his objections to the presentence report and his subsequent re-raising of the same argument in a motion to withdraw his guilty plea amounted to an inappropriate attempt to have the court reconsider a prior

ruling.

With that procedural and factual background in mind, we turn to Morgret's pending motion to withdraw his guilty plea. We emphasize that

> a shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose upon the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.

United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001).

The grounds currently advanced by Morgret in his motion to withdraw his guilty plea were initially raised in the motion he filed on December 19, 2003, for the same relief. Morgret consequently made the strategic decision, in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), to proceed on the basis of his guilty plea and litigate his objections to the presentence report. After unsuccessfully pursuing his objections to the presentence report, he now wishes to pursue an avenue he previously decided to waive. We are of the view that one reason to deny Morgret's current motion to withdraw his guilty plea is that it amounts to no more than a shift in defense tactics. However, that is not the only reason to deny the motion.

The standard governing the substantive merits of such motions requires us to consider 1) whether Morgret asserts his innocence, 2) the strength of Morgret's reasons to withdraw the

plea, and 3) whether the government would be prejudiced by the withdrawal. United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2004)(citing United States v. Brown, 250 F.3d, 811, 815 (3d Cir. 2001); United States v. Huff, 873 F.2d 709, 711 (3d Cir.1989)).

Morgret contends that the first factor weighs in his favor because he has repeatedly asserted "innocence of responsibility for the quantity of cocaine alleged by the Government." (Brief in Support of Motion to Withdraw Guilty Plea, p. 10) A defendant in Morgret's position who is seeking to withdraw his guilty plea is required to support his assertions of innocence with "facts in the record that support a claimed defense." United States v. Brown, 250 F.3d 811, 818 (3d Cir.2001) "Bald assertions of innocence ... are insufficient to permit a defendant to withdraw [a] guilty plea." Id.

To the extent that Morgret claims to be "innocent" of any drug quantity greater than that to which he has admitted, he has failed to cite any evidence in the record to support his position. As Morgret states in the documents filed in connection with his motion to withdraw his guilty plea, the drug quantity attributable to him has been a hotly contested focal point of this case from its inception. At the presentence hearing the government met its burden of proof and convinced us that Morgret is clearly responsible for the quantity of drugs determined by

the Probation Officer in the presentence report. The first factor weighs against granting Morgret's motion to withdraw his guilty plea.

The next element to consider is the strength of Morgret's reasons to withdraw the plea. Morgret seeks to withdraw his guilty plea because the advisory sentencing guideline imprisonment range applied to him is allegedly far greater than the potential imprisonment term of which he had been advised when he pled guilty. In the motion to withdraw his guilty plea, Morgret summarizes his position as follows:

> Nowhere in the Change of Plea transcript is there any acknowledgment whatsoever that Mr. Morgret was either told, or understood, that he could lose three levels for acceptance of responsibility by challenging the Government's version of the facts of weight of cocaine, number of trips to New York, the nature of the drugs, the money distribution and the arson case.

(Motion to Withdraw Guilty Plea, p. 5, ¶23) He contends that his misconception concerning the applicable imprisonment range is based on a number of circumstances, including inaccurate information given to him by the attorney who had represented Morgret at the change of plea proceeding.

For the purposes of this order we will accept as true Morgret's assertion that he was never orally advised during the change of plea proceeding that "he could lose three levels for acceptance of responsibility by challenging the Government's

version of the facts of weight of cocaine, number of trips to New York, the nature of the drugs, the money distribution and the arson case." There are at least three reasons why that assertion is of only marginal, if any, relevance.

First and foremost, the written plea agreement provides that

> if the defendant can adequately demonstrate ... acceptance of responsibility to the government, the United States hereby moves [sic] at sentencing that the defendant receive a three-level reduction in the defendant's offense level for acceptance of responsibility. The failure of the Court to find that the defendant is entitled to this three-level reduction shall not be a basis to void this plea agreement.

(Plea Agreement, p. 5, ¶9) As we stated in our order of March 14, 2006,

> [a]lthough it is very poorly written, the quoted sentence indicates that if Morgret "adequately" demonstrates his acceptance of responsibility to the government, then the government will move at sentencing for a three-level downward adjustment in Morgret's Total Offense Level. However, the next sentence clearly advises Morgret that the court may not grant the government's motion, and that such a refusal would not be a basis to void the plea agreement.

(Order of March 14, 2006, p. 4) In that order we were considering whether the failure to credit Morgret with a downward adjustment of three levels constituted a breach of the plea agreement by the government which would allow Morgret to withdraw his guilty plea. Although the issue we are currently considering (whether Morgret's alleged misconception of his guideline imprisonment range is a valid basis to allow him to withdraw his guilty plea) is slightly different, the quoted statements from

the plea agreement and the order of March 14, 2006, apply here with equal force. Obviously, Morgret's dispute with the government concerning drug quantity has lead the government to conclude that Morgret has not "adequately" demonstrated an acceptance of responsibility.

Moreover, when Morgret pled guilty to counts 1 and 6 of the second superseding indictment the text of the plea agreement clearly informed him that, as a general matter, he may or may not receive a three-level downward departure for acceptance of responsibility. Consequently, there was no need to advise him, during the change of plea proceeding, of the precise circumstances under which he would or would not receive that adjustment. The plea agreement further notified Morgret that the court was not bound to accept "any recommendations by the parties." (Plea Agreement, p. 10, ¶21)

There is another reason to discount the fact that no oral notice at the guilty plea proceeding was given to Morgret concerning the possibility that he may not receive any downward adjustment for acceptance of responsibility. This second reason relates to the specific information concerning the potential maximum sentence, and our sentencing procedures, which was orally provided to Morgret during the guilty plea proceeding.

The transcript of that hearing shows that Morgret was orally

advised of the following: 1) the maximum potential imprisonment term for the offense in count 1 was life; 2) the "United States has agreed to make a non-binding recommendation of a three level reduction in offense level for acceptance of responsibility ... [h]owever, the decision by the Court not to give that reduction or to follow that recommendation won't be a basis to ... get out of the plea agreement," (Guilty Plea Transcript, p. 7); 3) the Court is "free to impose any lawful sentence, up to the maximum sentence of life in prison," (Id., p. 9); 4) "should he receive a sentence he doesn't like, ... he will not be permitted to withdraw his guilty plea for that reason alone," (Id.); 5) the tentative guideline range was 292 to 365 months; and 6) the court was "not going to be able to determine what the guidelines are until after there's been a presentence report prepared by the probation officer[,] [Morgret] or the government or both will have the right to challenge the law[, and] [i]f there's a challenge on the facts, we'll have a presentence hearing ... [b]ut before all that – until all that is done, we are not going to be able to know what the guideline range is." (Id., pp. 13-14)

Based on the information orally provided to Morgret during his guilty plea colloquy, particularly the sixth item noted in the preceding paragraph, there can be no reasonable basis for Morgret to have believed that his guideline imprisonment range

would reflect a downward adjustment of three levels for acceptance of responsibility. The reasons put forth by Morgret to withdraw his guilty plea are not sufficiently strong to warrant such relief.

There is a third reason why Morgret need not have been advised of the possibility of the government's declination to move for a three-level downward adjustment if Morgret contested the drug quantity. The guidelines are complicated and his counsel had no obligation to advise Morgret in detail at or prior to the guilty plea of every circumstance which might compel the government not to recommend the three-level adjustment, or of the reasons why the Probation officer might decline to find Morgret entitled to the three-level adjustment.

In light of the foregoing, it does not appear necessary to address the third factor, which is the prejudice that would be experienced by the government if Morgret were allowed to withdraw his guilty plea. Nonetheless we will consider it.

In its brief opposing Morgret's motion to withdraw his guilty plea, the government represents that

> the United States will be prejudiced if Morgret is permitted to withdraw his guilty plea. Over four years have passed since the conduct giving rise to the criminal charges here. Co-defendants who have agreed to cooperate are nearing the end of their prison terms, if they have not already been released from custody. Those co-defendants who testified [at the presentence hearing] were transported from distant federal prisons and held in hold-over status while waiting

> to be called as witnesses at the presentence hearing. Several of the witnesses have expressed concern and anxiety about being in holdover status while waiting to testify based on the disruption to their prison routines and fear of retaliation as a result of their testimony. Allowing Morgret to withdraw his guilty plea will necessitate again transporting the co-defendants to testify at a trial and will result in considerable additional expense to the government and stress and anxiety for those witnesses.

(Government's Brief Opposing Motion to Withdraw Guilty Plea, pp. 7-8) We agree with the government's representations.

We will deny Morgret's motion to withdraw his guilty plea.

In closing we note that Morgret's brief addressing the sentencing factors set forth in 18 U.S.C. § 3553(a) was filed on March 5, 2006. The government filed its sentencing brief addressing those factors on March 21, 2006. Various procedural developments occurred before the deadline for Morgret to file his reply brief addressing the sentencing factors set forth in 18 U.S.C. § 3553(a). We will provide him with one final opportunity to file such a brief, and will schedule his sentencing.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Morgret may, by September 25, 2006, file a brief in reply to the government's sentencing brief.

2. Sentence will be imposed in federal court room number 1 in Williamsport, Pennsylvania, on October 16, 2006, at

4:00 p.m.

s/Malcolm Muir
MUIR, U.S. District Judge

MM:gja